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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 275

PUBLIC COMMON STOCKHOLDERS' PROTECTIVE COMMITTEE OF ARKANSAS NATURAL GAS CORPORATION,

Petitioner,

v.

SECURITIES & EXCHANGE COMMISSION, CITIES SERVICE COMPANY, ARKANSAS NATURAL GAS CORPORATION, ARKANSAS LOUISIANA GAS COMPANY, ARKANSAS FUEL OIL COMPANY, CLASS A COMMON STOCK COMMITTEE, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENT ARKANSAS NATURAL GAS CORPORATION CLASS A COMMON STOCK COMMITTEE, IN OPPOSITION

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Preliminary Statement

This brief is submitted by respondent Class A Common Stock Committee in opposition to the petition for a writ of certiorari of the Public Common Stockholders' Protective Committee of Arkansas Natural Gas Corporation (Common Committee).

Opinions Below

The opinion of the Court of Appeals is officially reported at 204 F. 2d 797 (R. p. 67a). The opinion of the District Court is reported at 109 F. Supp. 522 (R. 5a). The findings and opinion of the Securities and Exchange Commission (Commission), dated October 1, 1952, have not been officially reported, but are set forth in Holding Company Act Release No. 11511 (R. 62a).

Jurisdiction

Petitioner invokes the jurisdiction of this Court under 28 U. S. C. Sec. 1254.

Statute Involved

The statute involved is Section 11(e) of the Public Utility Holding Company Act of 1935 (the Act). The section is set forth in the Appendix hereto.

Questions Presented

1. Whether a common stock interest in a subsidiary that has received full parity treatment in the distribution of the assets of the company may complain of the action of the Commission in approving a proposal by the parent to pay a sum to each public Class A stockholder of the subsidiary in settlement of an alleged class wrong committed by the parent upon the public Class A stock.

2. Whether this Court will assume jurisdiction to issue directives to the Commission at the request of a petitioner who cannot benefit thereby.

Statement

A brief outline of the relevant facts suffices for present purposes.

The instant proceedings involve the reorganization, pursuant to the provisions of the Act, of Arkansas Natural Gas Corporation (Arknat), a registered holding company and a subsidiary of Cities Service Company (Cities).

In December 1951 Arknat and Cities joined in filing with the Commission an amended plan of reorganization for Arknat pursuant to the provisions of Section 11(e) of the Act.

The plan called for the redemption of Arknat's preferred stock issue and the distribution of all the remaining assets of Arknat on a parity basis to the common stock and Class A common stock which had equal rights except that the Class A stock did not have the right to vote.

During the course of the proceedings it had been asserted that Arknat had corporate claims against Cities arising out of certain challenged acts of Cities as controlling parent of Arknat. Under the plan Cities proposed to settle these corporate claims by paying out of its own funds the sum of $.25 per share to each public stockholder of Arknat.

Thus under the plan all public stockholders of Arknat shared equally in the assets of the corporation and in the proceeds of the settlement of the corporate claims asserted against Cities. Petitioner does not challenge the adequacy of the corporate settlement.

Finally this respondent asserted that the Class A stockholders it represented, had a class claim against Cities in that the Class A stock had been fraudulently induced by Cities to make a disproportionately large equity contribution to Arknat.

The facts that gave rise to this claim are detailed in the Commission's findings and opinion (R. 62a, pp. 40-42, 48, 49). We need refer to them only in briefest outline.

When Arknat was formed in 1928 all of the presently outstanding 4,000,000 shares of common stock were issued, of which Cities received 60%. Even after a substantial write-up of the assets, the book value of the common equity on December 31, 1928 amounted to $2.40 per share. It soon became necessary to raise additional capital, and as part of that effort, Cities, on behalf of Arknat, between March and September 1929, sold to the general public 2,500,000 shares of original issue non-voting common, known as Class A stock. This amount closely approximates the number of shares of Class A presently held by the public. Cities sold this stock through a corps of some 800 salesmen operating out of 29 branch offices throughout the country. The price to the purchaser was the closing market price of the stock on the New York Curb on the day prior to the sale and Cities fixed the Curb price through a monumental market rigging operation. During the period of the distribution the Curb price of the Class A stock, and hence the price paid by the public for the Class A stock concurrently sold by Cities salesmen, was artificially inflated from 7⅞ on March 29, 1929 to a high of 24¼ on September 24th. Cities remitted to Arknat a total of $21,448,373.69 and, as a result of having fraudulently procured the public Class A to pay a disproportionate amount for an equal, though non-voting, interest in Arknat, the book value of the common increased from $2.40 to $4.34 a share.

Clearly this was no corporate wrong to Arknat. On the contrary, it was a benefit to it, for as a direct result of Cities fraud, Arknat obtained more equity capital than it properly should have for the sale of the 2½ million shares of original issue stock. So, too, it was a benefit to the public common stockholders, and to Cities as a holder of

a majority of that issue, since the excessive capital contribution of the Class A inflated the value of each share of common.

And it is equally clear that Cities' fraud resulted in direct injury to the public Class A for that class had been induced to contribute equity capital far in excess of the equity stock interest accorded it.

Upon these facts this respondent contended that, within the principles enunciated by this Court in *Taylor* v. *Standard Gas & Electric Co.*, 306 U. S. 307, 322, 323 and *Pepper* v. *Litton*, 308 U. S. 295, 308, recognition must be accorded the fact that, at the expense of the Class A interest, Cities had fraudulently procured an inflated equity interest in Arknat.

Under the amended plan Cities proposed to settle this claim, advanced on behalf of the Class A stock, by the payment by Cities, out of its own funds, of $1.25 per share to each public stockholder of Arknat.

It is this portion of the plan that petitioner asks this Court to review. Cities submitted that it was fair and equitable; this respondent contended that it was insufficient. It was found fair and equitable by the Commission and the District Court of Delaware, and the Court of Appeals was "satisfied * * * with the review of the merits of the plan in the district court" (R. 68a).

ARGUMENT

Summary of Argument

We do not propose in this brief to argue at length the merits of the claim asserted on behalf of the Class A as against Cities. Were that claim challenged before this Court by Cities or by the common stockholders of Cities,* the only persons possibly affected, we might need to do so, as originally we did before the Commission. But the only one who complains is petitioner, the Common Committee of Arknat. Petitioner contends that the Class A stock had no valid claim against Cities and that the Commission should not have approved any payment by Cities to the Class A stockholders in settlement of that claim. Petitioner urges that this Court should issue its writ to review that portion of the plan and advise the Commission of its error.

Since the issue before this Court is whether its writ should issue, we address ourselves solely to the basic reasons why the petition must be denied:

1. Since the public common received parity treatment in the distribution of the assets of Arknat and in the proceeds of the settlement of the corporate claims that Arknat had against Cities, the public common is not a party aggrieved and may not petition this Court to review the propriety of a payment by Cities in settlement of an asserted Class A claim as against Cities, whether or not that claim had merit.

2. Since the settlement payment has been made with the approval of the Commission and the District Court

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* We find it difficult to believe that petitioner does not realize (petitioner's brief pp. 13, 25) that Cities counsel in stating that to penalize Cities is to penalize "its common stock" referred to the common stockholders of Cities and not to the common stockhloders of Arknat.

and no party affected thereby has appealed within the time permitted therefor, the propriety of the payment is moot, and will not be reviewed by this Court.

I

The common stock of Arknat has received its full aliquot interest in the assets of the corporation and in the settlement by Cities of the corporate claim asserted on behalf of Arknat as against Cities. Petitioner does not challenge the adequacy of that corporate settlement. Instead, it asserts that the class claim advanced on behalf of the A stock was without merit and therefore a plan that permitted a payment by Cities to the Class A stockholders in settlement of that class claim, in addition to and exclusive of the corporate claim, is not fair and equitable. Thus petitioner does not contend that the common stockholders are entitled to more; it contends only that the A stockholders were entitled to less.

But even if we were to assume that the claim asserted on behalf of the Class A stockholders was without merit, petitioner lacks standing to raise that question before this Court, since the common stock has no possible concern with any settlement tendered and paid by Cities to the A stock. If the claim asserted on behalf of the Class A stock lacked merit, Cities alone would have been the party aggrieved by the settlement it offered to and consummated with the A stock. But Cities tendered the offer, does not now complain thereof and the time within which Cities or any Cities stockholder might have complained has long since expired. In no event is the issue one on which petitioner may be heard. It has no interest therein; it is not injured thereby, and consequently, it is not a party aggrieved.

> "If, instead of showing any injury, the plaintiff shows that he cannot possibly be injured, he cannot, of course, ask the interference of the court."
>
> *Hooker* v. *Burr,* 194 U. S. 415, 419.

The petitioner suggests that it is directly affected by Cities' payment to the Class A in that had Cities not made an offer to settle the Class A claim, it might have been willing to pay a greater sum in settlement of the corporate claim. The conjecture lacks factual support,* and, in any event, such idle speculations as to what might have been are not legally cognizable.

All that the Commission had before it or could consider was the definitive, written plan whereby Cities voluntarily proposed to settle the corporate claims by the payment of 25¢ to each public stockholder, and to settle the claim asserted on behalf of the Class A stock by the payment of $1.25 to each public A stockholder.

The corporate settlement had to stand or fall on its own merits. It was approved by the Commission and the District Court and is not now challenged by petitioner. It is pointless to conjecture whether had Cities offered less or nothing in settlement of the class claim, it might have offered more in settlement of the corporate claim and the Commission might have found such larger payment fair and equitable.

In the present posture of the proceeding, the settlement of corporate claims for 25¢ per share is fixed and immutable and the propriety thereof is not open to review.

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* Testimony of Mr. Christian, an officer and director of Cities:

> "A. No. I think if you are compromising these claims, the Class A stockholders had claims which the common stockholders had no claim at all in.
>
> "You have to recognize that claim. That claim precisely is in connection with the sale of the Class A stock and the allegations that they provided more capital for Arkansas than did the common stockholders.
>
> "When you recognize that, which is not common to the common stockholders, then you must give some weight to it and that makes a difference in the amount that you are offering." (Transcript of Testimony, page 3026.)

"* * * this Court does not sit to decide arguments after events have put them to rest."

Doremus v. *Board of Education,* 342 U. S. 429, 433.

Whatever petitioner may believe, whatever personal pique it may have that the claim asserted on behalf of the Class A stock was also accorded recognition in the plan (though at the expense of Cities) is legally irrelevant. There is no place in appellate procedure for what has now become an exercise in "disinterested malevolence." (*American Bank and Trust Co.* v. *Federal Reserve Bank,* 256 U. S. 350, 358).

As to the payment by Cities in settlement of the claim of the A stock, petitioner is not a party aggrieved and therefore lacks standing in this Court to apply for a writ. (*Tileston* v. *Ullman,* 318 U. S. 44; *Tyler* v. *Judges of the Court of Registration,* 179 U. S. 405).

II

What could be accomplished by a review by this Court? Nothing to the benefit of petitioner. Indeed, nothing to the benefit or detriment of any other party.

The adequacy of Cities' settlement of the corporate claims has been approved by the Commission and the District Court. No one has appealed therefrom and the time to do so has long since expired. Cities therefore cannot be compelled to pay anything more than the 25¢ per share for which it has already received an irrevocable absolution.

Nor has petitioner urged that Cities should be compelled to pay something to the common as against a class claim that the common has against it. Petitioner did not assert such a claim; on the contrary, it states affirmatively that no such claim exists.

Thus it has been finally adjudicated that the common stock has received everything to which it is entitled and no pronouncement of this Court could now grant it more.

As to the propriety of the payment by Cities to the Class A stock in settlement of the class claim, that too has been approved by the Commission and the District Court. Cities, before the Commission, was a proponent of the settlement. Neither Cities nor any stockholder of Cities has appealed therefrom and the time to do so has long since expired. The payment has been made and the payment is now irrevocable; Cities cannot now claim it back, nor could the Class A stockholders be compelled to return it to Cities. And even if that settlement could have been negated, the only result would have been to have given the A stock less; the common could get no more.

But petitioner urges that, nevertheless, since it was grossly improper for the Commission to permit a payment in settlement of a worthless claim, it is the duty of this Court to so declare.

Petitioner misconceives the judicial function. This Court neither advises nor admonishes Governmental agencies respecting their procedure except when an issue related thereto is presented by a party whose rights may be affected by the determination of this Court. (*Chicago and Southern Airlines* v. *Waterman S.S. Corp.*, 333 U. S. 103, 113.)

> "A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it."
>
> *Amalgamated Asso.* v. *Wisconsin Emp. Rel. Bd.*, 340 U. S. 416, 418.

> "And even as to the kinds of questions which were the staple of judicial business, it was not for courts to pass upon them as abstract, intellectual problems but only if a concrete, living contest between adversaries called for the arbitrament of law."
>
> "It is not our function, and it is beyond our power, to write legal essays or to give legal opinions, however solemnly requested. * * * "
>
> *Coleman* v. *Miller*, 307 U. S. 433, 460, 462 (concurring opinion).

Since petitioner is not aggrieved by the result below and cannot benefit from any action of this Court, a justiciable controversy is not presented and the petition should be denied.

CONCLUSION

The petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

Section 11(e)

Section 11(e) of the Public Utility Holding Company Act [15 U. S. C. 79k(e)] reads as follows:

"Sec. 11(e). In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed."